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No. 05-1159

In the Supreme Court of the United States

MIKE HATCH, ATTORNEY GENERAL OF MINNESOTA,
PETITIONER

v.

CELLCO PARTNERSHIP, DBA VERIZON
WIRELESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. 332(c)(3)(A), which denies States "any authority to regulate * * * the rates charged" by a commercial mobile radio service carrier, preempts a Minnesota statute that prohibits a carrier from increasing a customer's rates unless the carrier provides the customer written notice 60 days before the effective date of the proposed increase and obtains the customer's consent to the increase.

2. Whether, under Minnesota law, the provisions of the Minnesota statute preempted by Section 332(c)(3)(A) are severable from the remaining portions of the statute.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, provides a federal framework for the regulation of wireless telephone services. Title III of the Act gives the Federal Communications Commission (FCC or Commission) exclusive authority to license the radio frequencies used in wireless communications. 47 U.S.C. 301, 303. In the exercise of that authority, the Commission has, since the mid-1970s, set aside and licensed radio frequencies for wireless telephone service. See *Connecticut Dep't of Pub.*

Util. Control v. *FCC*, 78 F.3d 842, 845 (2d Cir. 1996); *Cellnet Commc'ns, Inc.* v. *FCC*, 149 F.3d 429, 432 (6th Cir. 1998).

Until 1993, wireless communications common carrier services, such as cellular telephone service, were subject to the same system of dual federal and state regulation that applies to traditional wireline telephone services. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). Under that system, the *interstate* rates of common carriers were subject to Title II of the Act, which requires carriers to file tariffs with the Commission establishing the rates, terms, and conditions of interstate service. 47 U.S.C. 203. *Intrastate* common carrier rates, however, were subject to state regulation, pursuant to Section 2(b) of the Act, 47 U.S.C. 152(b).

In 1993, Congress amended the Act "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Commc'ns*, 149 F.3d at 433. The amendments created two regulatory categories of wireless service—commercial mobile radio service (CMRS) and private mobile radio service (PMRS).[1] The amendments also changed the framework of wireless service regulation in two significant respects.

First, Congress eliminated dual federal and state regulation and established instead a uniform "Federal regulatory framework to govern the offering of all" wireless telephone services. H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993); see *Connecticut Dep't of Pub. Util. Control*, 10 F.C.C.R. 7025, 7034 (¶ 14) (1995) (Congress wanted a "*national* regulatory policy for CMRS, not a policy that is

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[1] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. 332(d)(1). PMRS is a wireless communications service that is not CMRS or its functional equivalent. 47 U.S.C. 332(d)(3). The Act uses the terms "commercial mobile service" and "private mobile service." FCC rules substitute the equivalent terms CMRS and PMRS, which we use in this brief.

balkanized state-by-state"). To that end, 47 U.S.C. 332(c)(3)(A) generally denies the States "any authority" to "regulate the entry of or the rates charged by" CMRS or PMRS providers. 47 U.S.C. 332(c)(3)(A); see *Public Util. Comm'n of Haw.*, 10 F.C.C.R. 7872, 7874 (¶ 8) (1995) (*Haw. PUC*). A State may petition the FCC for permission to regulate CMRS rates, and the FCC shall grant permission if the State demonstrates that "market conditions * * * fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. 332(c)(3)(A)(i). Absent FCC authorization, however, Section 332(c)(3)(A) permits States to regulate only "terms and conditions" of CMRS "other" than rates and entry. 47 U.S.C. 332(c)(3)(A).[2]

Second, Congress amended the Act to reflect a "general preference in favor of reliance on market forces rather than regulation." *New York State Pub. Serv. Comm'n*, 10 F.C.C.R. 8187, 8190 (¶ 18) (1995). Congress limited CMRS regulation to situations "for which the Commission and the states could demonstrate a clear-cut need." *Haw. PUC*, 10 F.C.C.R. at 7874 (¶ 10). Thus, although CMRS providers are subject to Title II of the Act, the FCC is authorized to forbear from regulating them if certain criteria are satisfied. 47 U.S.C. 332(c)(1)(A).

The FCC has exercised that forbearance authority to exempt CMRS carriers from filing interstate tariffs. 47 C.F.R. 20.15(c); *Implementation of Sections 3(n) & 332 of the Communications Act*, 9 F.C.C.R. 1411, 1480 (¶ 179) (1994) (*Second Report & Order*). In addition, the FCC has consistently denied States permission to regulate CMRS rates and entry because States have failed to demonstrate that market forces are inadequate to protect customers. See, *e.g.*, *Connecticut*

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[2] In conformity with Section 332(c)(3)(A), Congress amended Section 2(b) of the Act to exclude intrastate CMRS rates and entry from state jurisdiction. 47 U.S.C. 152(b).

Dep't of Pub. Util. Control, 78 F.3d at 848; *Haw. PUC*, *supra*; *Public Util. Comm'n of Ohio*, 10 F.C.C.R. 7842 (1995); *California & Pub. Utils. Comm'n*, 10 F.C.C.R. 7486 (1995) (*Cal. PUC*).

The rates that CMRS providers charge their customers are thus generally governed "by the mechanisms of a competitive marketplace," in which terms of service are established by contract rather than by regulation. *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,032 (¶ 20) (2000). The largely deregulated environment has enabled competition to flourish, with substantial benefits to consumers. Rates are generally affordable, and there has been a proliferation of innovative pricing, such as family and prepaid plans. *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 20 F.C.C.R. 15,908, 15,911-15,912 (¶¶ 3-5), 15,964-15,966 (¶¶ 154-158) (2005). As a result, the number of subscribers has risen steadily and rapidly, and usage per subscriber has consistently increased. *Id.* at 15,912 (¶ 5), 15,970 (¶ 168).

2. On May 29, 2004, Minnesota enacted the Wireless Consumer Protection Act, Art. 5, Minn. Stat. § 325F.695 (Supp. 2006). Article 5 limits the ability of a CMRS carrier to implement a "substantive change" to a customer service contract. A "substantive change" is a contract modification "that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." Art. 5, subd. 1(d).[3]

Subdivision 3 of Article 5 requires a CMRS provider to "notify the customer in writing of any proposed substantive change * * * 60 days before the change is proposed to take effect." Art. 5, subd. 3. Even after the 60-day waiting period, the change cannot go into effect unless "the customer opts in

[3] A price increase that is attributable entirely to an increase in a tax or fee that the government requires the CMRS carrier to impose on the customer is not a "substantive change." Art. 5, subd. 1(d).

to the change by affirmatively accepting the change prior to the proposed effective date." *Ibid.* If the customer does not consent, "the original contract terms shall apply." *Ibid.*[4] Article 5 "expires August 1, 2007." Art. 5, subd. 5.

3. In 2004, a group of CMRS carriers filed suit in the United States District Court for the District of Minnesota seeking to enjoin enforcement of Article 5. As relevant here, the carriers contended that Subdivision 3 of Article 5 "regulate[s] * * * the rates charged" by CMRS providers and is therefore preempted by Section 332(c)(3)(A) of the Communications Act. 47 U.S.C. 332(c)(3)(A).

The district court entered a temporary restraining order enjoining enforcement of Article 5. Pet. App. 33a-44a. The court ruled that the CMRS providers had shown "an initial likelihood of success on the merits" of their claim that Article 5 is state rate regulation proscribed by Section 332(c)(3)(A). *Id.* at 41a. The court explained that Article 5 is "clearly aimed, in part, at rates," and it cannot be saved from preemption as "a 'generally applicable' consumer protection law" because "it is directed only at providers of cellular services." *Id.* at 39a-40a.

After additional briefing, however, the district court dissolved the temporary restraining order and denied in substantial part the preliminary injunction requested by the CMRS carriers. Pet. App. 16a-32a. Although the court reiterated

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[4] Subdivision 4 of Article 5 provides that a CMRS carrier, upon receiving a proposed customer-initiated change in a contract, "must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change." Art. 5, subd. 4. The customer's proposed change does not become effective unless the carrier agrees to the change and the customer agrees to any resulting changes in the contract. *Ibid.* Article 5 also requires a CMRS provider (1) to supply each customer, within 15 days of the date on which the service contract is entered, a written copy of the contract or, if requested by the customer, an electronic copy and (2) to "maintain verification that the customer accepted the terms of the contract for the duration of the contract period." Art. 5, subd. 2.

that Article 5 "certainly implicates rates" and "is directed at wireless providers," the court stated that it was "no longer convinced that the law presents impermissible rate regulation." *Id.* at 24a-25a. Instead, the court concluded, Article 5 "manifests basic principles of contract law" by requiring CMRS carriers "to disclose rates, to obtain consent to rate increases, and to honor contractual obligations." *Id.* at 25a.

4. The United States Court of Appeals for the Eighth Circuit reversed. Pet. App. 1a-15a. After examining the text, purpose, and history of Section 332(c)(3)(A), as well as prior interpretations of the provision by the FCC, the court held that Section 332(c)(3)(A) preempts Article 5.

The court "agree[d] with the FCC" that "fixing rates" of CMRS providers is rate regulation proscribed by Section 332(c)(3)(A). Pet. App. 9a (quoting *Pittencrief Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (¶ 20) (1997), review denied *sub nom. Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332 (D.C. Cir. 1999)). The court concluded that Subdivision 3 of Article 5 fixes rates because it "requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts." *Id.* at 10a. The court explained that those contracts typically allow providers to adjust rates after reasonable notice of fewer than 60 days if the customer does not opt out of the adjustment. *Ibid.* Subdivision 3, however, freezes rates for at least the statutory 60-day notice period, and the rate freeze continues for the remainder of the contract term unless the customer opts in to the proposed rate increase. *Id.* at 9a-10a.

The court of appeals rejected the State's argument that Subdivision 3 permits a CMRS carrier to put a proposed rate increase into effect immediately upon the customer's affirmative assent. Pet. App. 9a-10a. The court found the State's interpretation to be "inconsistent with the plain meaning of the text of the statute." *Id.* at 9a. The court explained that Subdivision 3 requires CMRS wireless carriers to notify cus-

tomers of "any proposed substantive change . . . 60 days before the change is proposed to take effect." *Id.* at 9a (quoting Art. 5, subd. 3). The statutory language, the court observed, does not contemplate a modification in the effective date if the customer consents to the rate increase. *Ibid.*

Even under the State's interpretation, the court of appeals concluded, Subdivision 3 "indisputably freezes rates for *some* period." Pet. App. 10a. For customers who do not consent to the increase, the rate freeze continues for the remainder of the contract, "often one or two years." *Ibid.* And, for other customers, the freeze continues until the customer manifests acceptance of the proposed increase. *Ibid.*

The court of appeals also rejected the State's contention that Subdivision 3 is not preempted by Section 332(c)(3)(A) because it is a "consumer protection measure." Pet. App. 10a. The court noted that "[a]ny measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a 'consumer protection measure.'" *Id.* at 10a-11a. Therefore, the court reasoned, "a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A)." *Id.* at 11a. The court held that consumer protection measures "that directly impact the rates charged by [CMRS] providers," such as Subdivision 3, do not escape preemption. *Ibid.*

The court also rejected the argument that Subdivision 3 is a "neutral application of state contractual or consumer fraud laws" of the kind that the Commission has determined not to be preempted by Section 332(c)(3)(A). Pet. App. 11a (citation omitted). The court explained that Subdivision 3 "goes beyond traditional requirements of contract law" because it "effectively voids" the "opt-out" provisions in existing CMRS contracts and mandates use of a different consent mechanism. *Ibid.* The court noted that "opt-out" provisions generally are legal and binding under Minnesota law. *Id.* at 11a-12a. The

court therefore concluded that Article 5 is preempted by Section 332(c)(3)(A) because it "has a clear and direct effect on" and thus "effectively regulates rates." *Id.* at 12a.

Finally, applying Minnesota law, the court found that the preempted portion of Article 5 cannot be severed from the remainder of the statute. Pet. App. 12a-15a. The court explained that Article 5 was enacted as "a unified effort to regulate certain practices of wireless telecommunications service providers," and the other subdivisions are "dependent upon" Subdivision 3. *Id.* at 13a. The court of appeals therefore remanded the case to the district court for entry of a permanent injunction against enforcement of Article 5. *Id.* at 15a.

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Nor does the decision below present an important issue of federal law that should be decided by this Court. This Court's review is therefore not warranted.

A. The Decision Of The Court Of Appeals Is Correct

1. The court of appeals correctly held that Section 332(c)(3)(A) preempts Article 5's requirement that CMRS providers provide advance notice of, and obtain customer consent for, any rate increases. Unless a State has obtained authorization from the FCC—which Minnesota has not done—Section 332(c)(3)(A) denies the State "any authority to regulate * * * the rates charged by any" CMRS carrier. 47 U.S.C. 332(c)(3)(A). A state statute like Article 5 that freezes rates at their current level under existing contracts amounts to direct regulation of rates in contravention of Section 332(c)(3)(A).

As the court of appeals observed (Pet. App. 9a), state legislation that "fixes" the rates of CMRS carriers is a form of rate regulation and is thus preempted by Section 332(c)(3)(A). Since the "dawn of modern utility regulation," laws that "fix

the prices a utility could charge" have been considered to be rate regulation. *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 477 (2002). Rate regulation has long been understood to include both governmental rate prescriptions, *e.g.*, *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 385-388 (1932), and limitations on rate increases, *e.g.*, *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 221-226 (1991); *Permian Basin Area Rate Cases*, 390 U.S. 747, 774-784 (1968). The court of appeals' construction of the phrase "regulate * * * the rates charged by" to include the fixing of charges or limitations on the ability to change rates thus accords with the traditional understanding of rate regulation.

The court's reading of Section 332(c)(3)(A) also accords with interpretations of that provision by the FCC. In adjudications under the Act, the FCC "has found the 'rates charged by' language to prohibit states from prescribing, setting, or fixing rates of CMRS providers." *Pittencrief Commc'ns, Inc.*, 13 F.C.C.R. at 1745 (¶ 20); *see, e.g.*, *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,035 (¶ 25) (Section 332(c)(3)(A) prohibits States from "set[ting] a prospective price for CMRS service"); *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,907 (¶ 20) (1999) (States "may not prescribe how much may be charged for [CMRS] services"). Because the FCC has been delegated authority to administer the Communications Act, 47 U.S.C. 151, 154(i), its reasonable interpretations of the Act in rulemakings and adjudications are entitled to deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984); see, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999). The court of ap-

peals correctly adhered to the FCC's interpretations of Section 332(c)(3)(A) here.[5]

The court of appeals also correctly concluded that Subdivision 3 of Article 5 "fixes rates" by imposing a rate freeze on every CMRS contract governed by Minnesota law. Pet. App. 9a-10a. As the court explained, Subdivision 3 establishes the existing contract rate as the state-mandated ceiling for at least 60 days, thereby forcing carriers to maintain rates different from those they would charge if they were permitted to invoke the terms in their contracts authorizing mid-term rate changes. In addition, Subdivision 3 also prohibits carriers from increasing rates for the life of the contract unless the customer expressly consents within the 60-day period. *Ibid.*

Petitioner contends (Pet. 27-28) that the court of appeals misread Minnesota law and that Subdivision 3 permits rate increases to take effect before the 60-day period expires if the customer consents before that time. As the court observed (Pet. App. 9a), however, petitioner's reading of Subdivision 3 finds no support in its language, which requires notice "60 days before the change is proposed to take effect" and does not authorize any subsequent alteration in the effective date. Art. 5, subd. 3. Moreover, even under petitioner's reading, Subdivision 3 fixes rates. The statute freezes rates for the remainder of the contract term for every customer who does not consent to the rate increase, and it freezes rates for all customers until they consent.

As the court of appeals noted, the FCC has ruled that a state-imposed delay in the effective date of rate increases

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[5] The courts of appeals have consistently held that the Commission's construction of Section 332(c)(3)(A) is entitled to *Chevron* deference. See, *e.g.*, *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238, 1253 (11th Cir. 2006); *Fedor* v. *Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004); *Sprint Spectrum, L.P.* v. *State Corp. Comm'n.*, 149 F.3d 1058, 1061 (10th Cir. 1998).

constitutes "rate regulation" under Section 332(c)(3)(A). Pet. App. 7a (citing *Haw. PUC*, 10 F.C.C.R. at 7882 (¶ 46) (concluding that Hawaii was regulating rates because its review procedures caused 30-day delays in "most rate or service offerings")). That interpretation of Section 332(c)(3)(A) by the FCC, like the broader view that statutes fixing rates involve rate regulation, see pp. 9-10, *supra*, is a reasonable construction of the Act and is entitled to deference.

Government-imposed price freezes are a common mechanism for regulating rates. See, *e.g.*, *California ex rel. Lockyer* v. *FERC*, 329 F.3d 700, 704 (9th Cir. 2003); *Michigan Bell Tel. Co.* v. *Engler*, 257 F.3d 587, 591 (6th Cir. 2001); *California Power Exch. Corp.* v. *FERC*, 245 F.3d 1110, 1115 (9th Cir. 2001); *Norwood* v. *FERC*, 217 F.3d 24, 26 (1st Cir. 2000), cert. denied, 532 U.S. 993 (2001). And construing a state-imposed rate freeze to constitute rate regulation prohibited by Section 332(c)(3)(A) furthers the purposes of the Communications Act. A rate freeze undercuts the federal free-market approach to CMRS oversight and the related policy of eliminating tariff requirements, which is designed to allow carriers to respond quickly to competitors' price changes without a required waiting period. *Second Report & Order*, 9 F.C.C.R. at 1479 (¶ 177). State-based rate restrictions also threaten to balkanize the framework for CMRS rate regulation, contrary to Congress's desire for a uniform, federal regulatory scheme that reflects the increasingly nationwide character of the wireless industry.

2. Petitioner argues that the Minnesota statute "does not involve any state oversight of wireless rates" and is therefore not state rate regulation prohibited by Section 332(c)(3)(A). Pet. 25. That is incorrect. The statute effectively establishes a maximum lawful rate for at least a 60-day period for all CMRS contracts and for the life of the contract in the absence of consent. That statutory price freeze is essentially equivalent to a prescription by the State of a maximum charge. See

AT&T Co. v. *FCC*, 487 F.2d 865, 875 (2d Cir. 1973) (FCC rule prohibiting carrier from changing rates without prior permission from the FCC is a prescription of existing rates). A state-imposed maximum charge certainly constitutes state "oversight" of rates.

Petitioner also contends that, before the adoption of Section 332(c)(3)(A) in 1993, state rate regulation was "commonly accomplished by government agency oversight of rates" in the form of tariff requirements and review for reasonableness. Pet. 25. According to petitioner, therefore, Section 332(c)(3)(A) must be construed to prohibit only the same type of rate regulation that was common before its enactment. That argument is wrong both historically and legally. As an historical matter, rate regulation before 1993 was not limited to government review of the reasonableness of filed tariffs. For example, some States did not require wireless carriers to file tariffs but instead regulated rates through the use of their complaint authority. See, *e.g.*, *Petition of the State of Ohio*, 10 F.C.C.R. 12,427, 12,429 (¶ 5) (1995). Other States permitted carriers to file tariffs establishing a range of rates and gave carriers broad leeway to change rates within the range. See, *e.g.*, *New York State Pub. Serv. Comm'n*, 10 F.C.C.R. at 8196 (¶¶ 40-42); *Cal. PUC*, 10 F.C.C.R. at 7508-7509 (¶¶ 45-46).

In any event, preemption under Section 332(c)(3)(A) is not limited to traditional forms of rate regulation. Section 332(c)(3)(A) broadly preempts "any" state regulation of rates (47 U.S.C. 332(c)(3)(A)), and there is no indication that Congress intended that the statutory term "any" must be given a narrow construction. Rather, the term supports the FCC's conclusion that Congress sought to proscribe all types of regulation of CMRS rates, not just regulation accomplished through the forms that were common when Section 332(c)(3)(A) was enacted. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (explaining that "the

word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)).

Petitioner also errs in contending that the Minnesota statute is exempt from preemption because, as "a consumer protection measure," it necessarily "falls within the 'other terms and conditions'" that Congress authorized States to regulate. Pet. 27 (quoting Section 332(c)(3)(A)). As the court of appeals explained (Pet. App. 10a-11a), virtually all rate regulation can be characterized as a form of "consumer protection." But Congress clearly did not intend the States to be able to accomplish under the "consumer protection" label what it prohibited them from accomplishing by "rate regulation." Thus, when state laws have "a clear and direct effect on rates," they constitute prohibited rate regulation without regard to whether they might also be characterized as consumer protection legislation. Pet. App. 12a.

Petitioner is likewise mistaken in arguing that the court of appeals "failed to follow this Court's established preemption standards" by "completely ignor[ing] the * * * presumption against preemption." Pet. 21. As this Court has recognized, the "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); see *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). There has long been a "significant federal presence" in the regulation of wireless communication services. To be sure, until 1993 the States retained regulatory authority over rates for intrastate wireless service. But the 1993 amendments expressly repealed that authority and extended the significant federal presence. See pp. 1-2, *supra*. Accordingly, the "'assumption' of nonpreemption" has no application here.

In any case, as petitioner concedes (Pet. 21), the court of appeals expressly endorsed the standards that petitioner con-

tends the court failed to follow. See Pet. App. 5a (stating that the court "presume[d] that Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose'" (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)). Thus, petitioner's real contention is that the court of appeals failed to apply that standard correctly. That contention is incorrect and does not, in any event, warrant this Court's review. See Sup. Ct. R. 10(c) (misapplication of settled law is generally not grounds for granting certiorari).

Petitioner also erroneously contends (Pet. 22-24) that the court of appeals held that state laws requiring customer consent to an extension in the length of a wireless contract are preempted by Section 332(c)(3)(A). The court announced no such holding. Instead, it based its preemption ruling solely on the ground that Subdivision 3 of Article 5 prevents or delays *rate increases* and thus directly regulates rates. See Pet. 9a-12a. The court expressed no view on whether the 60-day notice and consent requirement for *contract-term extensions* itself constituted impermissible rate regulation—an issue that the parties addressed only in passing and the FCC declined to address at all. See Resp. C.A. Br. 31 & n.14; Pet. C.A. Br. 40; Resp. C.A. Reply Br. 10 n.7; FCC Amicus Br. 2 n.1. There was no need for the court to address that issue, given its holdings that Article 5's provisions preventing or delaying rate increases were preempted and that other provisions of Article 5 were not severable. Although the court did not expressly address the severability of Article 5's restrictions on contract extension, that omission is hardly surprising, because the parties themselves did not address that specific issue in their appellate briefs. Moreover, it seems clear that the court would not have found those provisions severable in light of its general severability holding, which does not warrant this Court's review for reasons described below. See p. 19, *infra*.

B. The Decision Of The Court Of Appeals Does Not Conflict With The Decision Of Any Other Court

As petitioner forthrightly concedes, "[t]his case presents the first time" that a court of appeals has ruled on whether a statute like Minnesota's is preempted by Section 332(c)(3)(A). Pet. 7. Because "no other circuit court has decided the novel questions presented here" (Pet. Reply Br. 2 n.1), the decision below does not conflict with the decision of any other court of appeals. Indeed, there is no conflict with the decision of any other court.

Petitioner asserts that the "analysis" of the decision below "conflicts in principle" with the Seventh Circuit's decision in *Fedor* v. *Cingular Wireless Corp.*, 355 F.3d 1069 (2004). Pet. Reply Br. 2 n.1. This Court's review would not be warranted even if petitioner were correct, because the Court resolves actual conflicts in results, not analytic conflicts in principle. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (noting that Court "reviews judgments, not statements in opinions"). But there is no conflict, even in analysis. In *Fedor*, the Seventh Circuit held that Section 332(c)(3)(A) did not preempt claims that a wireless carrier violated state law by improperly billing its customers in one month for minutes that they had incurred in another month. 355 F.3d at 1070-1071, 1075. The court reasoned that the "claims address[ed] not the rates themselves, but the conduct of [the carrier] in failing to adhere to those rates." *Id.* at 1074. That reasoning has no relevance here because, unlike the claims in *Fedor*, Subdivision 3 of Article 5 directly regulates the permissibility and timing of rate increases. Petitioner asserts that, in reaching its holding, the Seventh Circuit also reasoned that "laws of general applicability that do not require a court to assess the reasonableness of rates charged" are not preempted. Pet. Reply Br. 2-3 n.1. That reasoning too has no relevance to this case, because the court below determined that Article 5 is not a law of

general applicability. See Pet. App. 11a (noting that the "statute effectively voids the terms of contracts currently used by providers in one industry"). Moreover, although the Seventh Circuit noted that the plaintiff in *Fedor* was not asking the court to review the reasonableness of the rates charged, see 355 F.3d at 1074, the Seventh Circuit did not state that preemption can occur only in that circumstance.

Petitioner also errs in asserting (Pet. Supp. Br. 1-4) that there is an "apparent split" or "conflict in principle" between the decision below and *National Ass'n of State Util. Consumer Advocates* v. *FCC*, 457 F.3d 1238 (11th Cir. 2006). In that case, the Eleventh Circuit held that the FCC exceeded its authority in construing Section 332(c)(3)(A) to preempt state laws that require or prohibit the use of line items in billing by cellular wireless carriers. *Id.* at 1242. The court reasoned that the prohibition or requirement of a line item is not rate regulation because "it does not affect the amount that a user is charged for service" but only "affects the presentation of the charge on the user's bill." *Id.* at 1254. Here, in contrast, the Eighth Circuit found that Article 5 does "affect the amount that a user is charged for service," because it prevents CMRS providers from implementing otherwise permissible rate increases without first giving 60 days notice and obtaining consumer consent. As the court of appeals explained, Article 5 thus "has a clear and direct effect on rates." Pet. App. 12a. Accordingly, the decision is entirely consistent with the Eleventh Circuit's holding that line-item requirements and prohibitions are not preempted. Indeed, the Eleventh Circuit quoted with approval the FCC's statement that Section 332(c)(3)(A) prohibits States from "fixing rates of [wireless service] providers." 457 F.3d at 1256 (citations omitted). The court of appeals in this case quoted and applied that very same principle in concluding that Minnesota's statute is preempted because it "fixes the rates" that providers may charge. Pet. App. 9a. There is no conflict.

C. This Case Does Not Present An Important Question Of Federal Law That Warrants This Court's Review

1. Petitioner contends that the decision in this case "has immensely important, far-reaching implications for the sovereign rights of the fifty States and their 184 million wireless customers." Pet. 7. That is incorrect. No other State has enacted a statute that freezes CMRS rates, and the Minnesota statute expires by its own terms on August 1, 2007. Art. 5, subd. 5. Although petitioner asserts (Pet. Reply Br. 7) that the Minnesota Legislature could extend the statute, no legislation of that kind is presently pending. The decision below therefore has limited importance even in Minnesota, much less broad importance throughout the 50 States.

Contrary to petitioner's contention (Pet. 8, 9-11), the court of appeals' decision does not prevent the States from prohibiting unfair business practices by wireless providers. The decision holds only that a state law is preempted if it "freezes" the rates that CMRS providers may charge and thus "has a clear and direct effect on rates." Pet. App. 9a, 12a. Under the court's decision, state laws that are targeted at CMRS providers and that "directly impact" CMRS rates are preempted even if the State labels them consumer protection laws, *id.* at 11a, but the decision in no way calls into question the power of the States to enact generally applicable laws prohibiting unfair business practices, or other laws that do not directly affect wireless rates.

Petitioner is also incorrect in asserting (Pet. 8, 12) that the court of appeals' decision bars States from enacting laws of general applicability that require notice and consent to changes in contract terms. On the contrary, the decision suggests that laws of general applicability, such as "neutral * * * state contractual or consumer fraud laws," may be exempt from preemption even if they have an effect on CMRS rates. Pet. App. 11a. The court cited with apparent approval

rulings by the FCC that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332" because those laws have only "indirect and uncertain effects" on rates and "fall no more heavily on CMRS providers than on any other business." *Id.* at 8a (quoting *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,908 (¶ 23), and *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,034-17,035 (¶ 24)). The court correctly concluded, however, that Article 5 is not such a law. Pet. App. 11a-12a.

Petitioner further errs in arguing (Pet. 14-20; Pet. Supp. Br. 3-6) that the decision below calls into question the authority of the States to enact consumer protection or other laws specific to the wireless industry. As discussed above, the only laws that would be preempted under the reasoning of the court of appeals are those that "fix[] [CMRS] rates" or have a "clear and direct effect on [CMRS] rates." Pet. App. 9a, 12a. Other laws, even those targeted at the wireless industry, are unaffected by the rule of law applied below. Petitioner's prediction (Pet. 14) that the decision below "could be interpreted" to prohibit all state consumer protection laws targeting CMRS is both conjectural and improbable. It presumes that courts interpreting the decision will ignore the test actually used by the court of appeals to decide the preemptive reach of Section 332(c)(3)(A), which requires a showing that the challenged regulation "directly impact[s] the rates charged by providers." Pet. App. 11a.[6]

[6] Petitioner asserts (Pet. 17-18) that the decision below jeopardizes the validity of a variety of existing wireless-specific statutes. Many of the statutes petitioner identifies, however, do not involve rate or entry regulation and are therefore not affected by the court of appeals' decision. For example, there is no reason to believe that the court (or the FCC) would conclude that Section 332(c)(3)(A) applies to state statutes that prohibit a CMRS provider from including the telephone number of a customer in a directory or telephone database without that customer's consent, mandate acknowledgment of any minimum term in a CMRS contract, subject CMRS providers to telephone-

Petitioner's contention that the court's decision calls into question state consumer protection legislation "targeted at landline communication carriers" is also incorrect. Pet. Reply Br. 4. The preemptive reach of Section 332(c)(3)(A) is limited to state laws that regulate the entry and rates of wireless providers. Nothing in the court's decision suggests that the court interpreted Section 332(c)(3)(A) to preempt state legislation governing landline services.[7]

2. Finally, petitioner argues that the court of appeals, by enjoining Article 5 in its entirety, misapplied Minnesota's law on severability. That issue also does not warrant further review. This Court does not sit to review claims of error in the interpretation of state law. *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). Furthermore, petitioner does not contend that the court of appeals failed to state correctly the Minnesota law of severability, and this Court does not generally grant review "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10(c).

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number conservation measures, or require the disclosure of contract terms. *Ibid.* Indeed, the FCC has expressly stated that state laws governing the disclosure of CMRS rates are not preempted. See *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,026 (¶ 8); *Southwestern Bell Mobile Sys.*, 14 F.C.C.R. at 19,908 (¶ 23). Nothing in the court of appeals' decision undercuts that administrative determination.

[7] The only case cited by petitioner in support of his claim that the decision below affects state laws governing landline services, *OCMC, Inc.* v. *Norris*, 428 F. Supp. 2d 930 (S. D. Iowa 2006), actually supports the contrary proposition. The district court in *OCMC* expressed the view that the state laws governing landline services at issue in that case were *not* preempted, and the court noted that the decision in this case "was based on the language of 47 U.S.C. § 332(c)(3)(A), which explicitly preempts the states from regulating the rates that *cellular* telephone companies may charge." *Id.* at 940 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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